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No. 03-1722

IN THE

Supreme Court of the United States

VERIZON INTERNET SERVICES, INC.,
Cross-Petitioner,

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONSE TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether Congress may authorize federal district court clerks to perform the ministerial task of issuing a subpoena for the identity of an alleged copyright infringer, based on the presentation of documentation that indicates a sufficient basis for an infringement action.

PARTIES TO THE PROCEEDING

Petitioner Recording Industry Association of America, Inc. was the appellee below. Verizon Internet Services, Inc. was the appellant. The United States intervened to defend the constitutionality of the Digital Millennium Copyright Act.

RULE 29.6 DISCLOSURE

Petitioner is a not-for-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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BRIEF IN RESPONSE

The Recording Industry Association of America ("RIAA") respectfully submits this Brief in Response to Verizon Internet Services, Inc.'s ("Verizon's") Conditional Cross-Petition.

It is unclear why Verizon has filed a conditional cross-petition seeking review of its Article III challenge to § 512(h) of the Digital Millennium Copyright Act ("DMCA"). Verizon does not seek to alter or modify the judgment of the D.C. Circuit in any respect, and Verizon's constitutional arguments (if successful) would not expand the relief it would receive in this case. Moreover, as Verizon notes, it raised the Article III issue in the D.C. Circuit. Cross-Pet. at 14. Verizon would therefore be free to raise the issue in this Court as an alternative ground for affirmance in the event certiorari were granted on RIAA's petition. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

As will be shown, Verizon's Article III challenge to § 512(h) lacks any merit, and therefore is not, standing alone, "of sufficient general importance to justify [a] grant of certiorari." *United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975). Nevertheless, because both RIAA's interests and those of the public would be served by a conclusive resolution of all of Verizon's potential objections to § 512(h), and because Verizon could raise the issue as an alternative ground for affirmance if RIAA's petition is granted, RIAA has no objection to this Court considering the Article III issue in conjunction with the question presented in RIAA's petition.

STATEMENT OF THE CASE

Much of the history of this case is set forth in RIAA's Petition for Writ of Certiorari. In this statement, RIAA provides limited additional detail concerning litigation on the Article III issue raised by the conditional cross-petition.

The Clerk of the District Court for the District of Columbia issued the first of the two DMCA subpoenas at issue in this case on July 24, 2002. At that time, Verizon objected to the subpoena, arguing that § 512(h) does not authorize issuance of subpoenas to Internet service providers ("ISPs") that merely transmit infringing material. Verizon did not raise any Article III objections to the subpoena.

RIAA moved to compel compliance with the subpoena. In response, Verizon made its statutory argument and suggested in passing that § 512(h) might raise Article III concerns. At oral argument, however, Verizon disclaimed any contention that § 512(h) violated Article III. Pet. App. 49a ("Verizon, however, does not assert that the subpoena power in subsection (h), as applied to service providers (like Verizon) under subsection (a), is unconstitutional."). The district court rejected Verizon's statutory arguments and did not decide the Article III issue (which was not before it). Pet. App. 49a & n.17.

RIAA issued a second subpoena to Verizon on February 3, 2003, to identify a second Internet infringer. This time Verizon moved to quash the subpoena, and argued for the first time that the DMCA violated both Article III and the First Amendment. The United States intervened to defend the constitutionality of the statute.

After briefing and argument, the district court rejected Verizon's constitutional challenges. In particular, the court rejected Verizon's Article III challenge, holding that the issuance of a subpoena by a district court clerk is a

"quintessentially ministerial duty" that does not implicate the Judicial Power, Pet. App. 61a:

> [T]he fact that Congress has directed an employee of the judicial branch to carry out a specific non-discretionary function neither implicates Article III judicial power nor involves federal judges in an investigation of the sort properly relegated to one of the other branches. In a real-world sense, no Article III judge takes any action with respect to a § 512(h) subpoena until the copyright holder moves to enforce the subpoena or the service provider moves to quash it – at which time there is a concrete controversy sufficient to confer jurisdiction under Article III of the Constitution.

Pet. App. 63a.

The district court catalogued a host of analogous federal provisions, focusing particularly on Federal Rule of Civil Procedure 27, which it found to be a "close parallel" to § 512(h) and indistinguishable for purposes of Article III. Pet App. 74a, 64a-70a. In Rule 27, the court found "a compelling precedent for judicial compulsion of information outside the context of a pending case or controversy," Pet. App. 70a, and the court specifically noted that a § 512(h) subpoena request must meet requirements similarly rigorous to those required for obtaining a Rule 27 deposition, Pet. App. 67a. The district court directed Verizon to comply with the subpoena and denied Verizon a stay pending appeal, finding no "substantial likelihood that Verizon will prevail on the merits of its Article III challenge." Pet. App. 100a.

The D.C. Circuit reversed the district court on statutory grounds and did not reach the Article III issue. The court of appeals, however, held that there was Article III jurisdiction to review the orders in question. Pet. App. 2a n.1.

ARGUMENT

I. SECTION 512(h) DOES NOT VIOLATE ARTICLE III.

A. Congress Has the Power To Authorize Discovery Prior to the Filing of a Complaint.

1. Even if the issuance of a subpoena by a court clerk involves an exercise of the Judicial Power, § 512(h) is constitutional. As the United States noted in defending the statute in the court of appeals, "[t]he central fallacy of [Verizon's] argument is that it confuses the *existence of an Article III controversy* with the *pendency of a complaint*." Brief of the United States, No. 03-7015, at 9 (D.C. Cir. filed July 16, 2003) (emphasis in original). Here a concrete case or controversy exists between the copyright owner and the copyright infringer that cannot be adjudicated absent disclosure of the infringer's identity. Where such a controversy exists, Article III poses no bar to pre-litigation discovery mechanisms, such as those that have been enshrined in federal law since the Judiciary Act of 1789. All that is required is the existence of a controversy cognizable in federal court, not the existence of a pending case.

In this respect, § 512(h) subpoenas are indistinguishable on any relevant ground from the discovery permitted under Federal Rule of Civil Procedure 27, which is the modern version of a pre-litigation discovery provision that Congress first established in 1789 and that has a far older pedigree. Under Rule 27, a person who wishes to preserve testimony "regarding any matter that may be cognizable in any court of the United States" may seek discovery, before any complaint has been filed, in order to preserve evidence for potential future litigation.

Section 512(h) and Rule 27 function almost identically. Like a § 512(h) subpoena, Rule 27 provides a means of obtaining discovery prior to the filing of a complaint. And like a party obtaining a § 512(h) subpoena, a person seeking

discovery under Rule 27 may proceed without actually filing a complaint at the time the process is invoked or at any point thereafter. In the district court's words, "under both Rule 27(a) and § 512(h), private parties may avail themselves of judicial machinery to obtain information prior to the filing of a complaint—but only if they satisfy a specific set of criteria and identify with particularity the information they seek to compel." Pet. App. 68a.

If there is any functional difference between Rule 27 and § 512(h), it is that § 512(h) maintains a closer connection to the case or controversy that supports its use. Under Rule 27, a court may order discovery as long as there is "a sufficient likelihood that the expected litigation will eventuate," a requirement that may be met even if the proposed litigation is contingent on the passage of administrative action or on legislation that would create a cause of action. *De Wagenknecht v. Stinnes*, 250 F.2d 414, 416-17 (D.C. Cir. 1957). In contrast, a § 512(h) subpoena may issue not on a mere showing that a proposed claim "may be cognizable" in federal court, Fed. R. Civ. P. 27(a)(1), but only to protect the particular rights identified in Title 17 of the U.S. Code, 17 U.S.C. § 512(h)(2)(C). Unlike discovery under Rule 27, which contains no limits on when the preservation of testimony may be sought, a DMCA subpoena cannot issue until the claim at issue is ripe, that is, until after the infringement has occurred. And in seeking a § 512(h) subpoena, a party must attest to all the elements of a copyright claim: ownership of, or license to, a particular copyright; and a violation of its exclusive rights. 17 U.S.C. § 512(h)(2)(A) (requiring presentation of a notice like that described in § 512(c)(3)(A)). If Rule 27 discovery is sufficiently connected to the underlying case or controversy that supports it, as Verizon concedes, then a § 512(h) subpoena satisfies Article III *a fortiori*.

Similarly, to whatever extent the DMCA subpoena invokes the Judicial Power at all, it invokes that power to a much lesser extent than does Rule 27. Under Rule 27, a party may seek a broad range of discovery, including oral examination, the production of documents, an inspection of land, and even mental and physical examinations. Fed. R. Civ. P. 27(a)(3). In contrast, under § 512(h), copyright holders can use only one discovery device and can obtain only limited information to identify defendants against whom to bring suit.

2. Verizon identifies distinctions between Rule 27 and § 512(h) that it claims are dispositive. Some of these are not even distinctions; none of them is relevant to Article III.

First, Verizon contends that Rule 27 requires "an unequivocal intention to bring a lawsuit in federal court," whereas § 512(h) does not. That is incorrect. In fact, Rule 27 requires only that the petitioner "expects" to be a party. But because a Rule 27 petitioner may be a potential defendant, whether a lawsuit follows the Rule 27 deposition may very well be out of the petitioner's control. Moreover, as explained *supra*, the expectation of potential litigation need not evolve into actual litigation. Under prior versions of Rule 27, including that contained within the First Congress's Judiciary Act of 1789, there was no requirement that the petitioner even expect to become a party. 1 Stat. 88, 90. The DMCA subpoena, in contrast, requires an actual allegation of copyright infringement, and is thus more closely tied to a case or controversy.

Second, Verizon suggests Rule 27 may be used only to preserve testimony, whereas DMCA subpoenas are "discovery." This is both wrong and irrelevant. It is wrong because DMCA subpoenas are critical to the preservation of evidence. ISPs maintain IP (Internet Protocol) address logs for only a limited period of time, and § 512(h) allows

copyright owners to preserve evidence identifying potential defendants before that evidence is destroyed, thus performing the same role that Rule 27 performs. Pet. App. 69a. In any event, Verizon offers no reason to believe that obtaining discovery to identify possible defendants is less permissible under Article III than preserving evidence.

Third, Verizon notes that a Rule 27 petition is not heard *ex parte*, whereas § 512(h) permits a copyright owner to obtain a subpoena without an adversary proceeding. Cross-Pet. at 26. As an initial matter, Verizon's characterization of the clerk's duty as a "hearing" does not conform with reality; the clerk is merely performing a ministerial duty. In any case, however, Verizon cannot explain why Article III is violated by the lack of an adversarial proceeding. Clerks routinely issue summonses and subpoenas without adversaries present. And federal courts may hear requests for temporary restraining orders on an *ex parte* basis under Rule 65(b).

Fourth, Verizon contends that Rule 27 is exceptional because its "roots in equity . . . predate the Constitution." Cross-Pet. at 27. Far from distinguishing the DMCA subpoena provision, this argument demonstrates that § 512(h) is just another form of a long-accepted mechanism for pre-complaint discovery. A § 512(h) subpoena is thus not some unprecedented effort "to discover facts unconnected to any case or controversy," as Verizon contends, Cross-Pet. at 27, but Congress's most recent recognition of "the right to file a bill of discovery to ascertain the proper persons to make defendants in a proposed suit at law." *Brown v. McDonald*, 133 F. 897, 898 (3d Cir. 1905); *see* 2 Joseph Story, *Equity Jurisprudence* § 1483, at 811 (13th ed. 1886); 18 Rev. Stat. § 866 (1878) (continuing the practice in

chancery of allowing certain pre-litigation depositions relating to matters cognizable in federal court).[1]

At bottom, § 512(h) is nothing more than another device for achieving what courts have accomplished for centuries through similar means. In emphasizing that Article III is concerned "not with form, but with substance," this Court has reasoned that "[t]he judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked." *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933). Accordingly, when Congress provides an alternative means of accomplishing what Verizon recognizes has been achievable since 1630 by the "John Doe" lawsuit, Cross-Pet. at 7-9, and the alternative means themselves have firmly-planted historical roots, there is no basis for claiming that Congress has violated Article III. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) ("Congress is not confined to traditional forms or traditional remedies.").

B. The Ministerial Act of Issuing a Subpoena Is Not an Exercise of the Judicial Power.

1. Even if the foregoing considerations were not dispositive, § 512(h) would raise no Article III problem. It is well established that Congress has the power to authorize the issuance of a subpoena backed by the enforcement authority of the federal courts even if the subpoena does not seek evidence for use in a cognizable "case or controversy." Indeed, it has been the law for more than a century that Congress may authorize subpoenas in the exercise of its

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[1] Equitable bills of discovery to learn the identities of potential defendants (as distinct from bills to preserve testimony) date back at least 300 years. *See, e.g., Heathcoote v. Fleete*, 2 Vern. 442, 23 Eng. Rep. 883 (Ch. 1702) (permitting discovery prior to filing a lawsuit in order to ascertain the name of a wharf owner alleged to be negligent). There is no basis for concluding that the Framers intended to discontinue this longstanding equitable practice.

Article I powers, and that Article III courts can enforce such subpoenas independent of a pending judicial proceeding.

That is the precise holding of *ICC v. Brimson*, 154 U.S. 447 (1894). In *Brimson*, rejecting the claim Verizon advances here, the Court held that Congress has Article I authority to provide for the issuance of subpoenas backed by judicial enforcement even if the subpoenas do not seek evidence for a judicial proceeding, and that Article III courts act within their "case or controversy" authority in adjudicating disputes over such subpoenas. *Id.* at 478, 485.

In *Brimson*, the Interstate Commerce Commission had issued subpoenas to parties as part of an investigation it was conducting under authority delegated by Congress. When the parties refused to comply with the subpoenas, the ICC sought enforcement in federal court, as the statute provided. The Court rejected the subpoenaed parties' argument that such subpoenas are "judicial" in nature and cannot be authorized outside of a pending judicial proceeding, and thus that the Interstate Commerce Act violated Article III by "authoriz[ing] the circuit courts of the United States to use their process in aid of inquiries before the [ICC]" in the absence of a pending case or controversy. *Id.* at 468. The Court reasoned that "[w]ithout the aid of judicial process of some kind," Congress's substantive regulatory efforts would lack a means of meaningful enforcement. *Id.* at 485. Accordingly, the Court found it "clear and indisputable" that Congress had the power to authorize the issuance of judicially-backed subpoenas outside the context of a pending judicial proceeding. *Id.* at 476.[2]

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[2] The Court's decision in *Brimson* also makes clear that what Verizon terms "bizarre consequences," Cross-Pet. at 22, are in fact quite permissible. Verizon complains that judicial review or enforcement of subpoenas issued by a court clerk would be problematic. But *Brimson* itself found no problem with judicial enforcement of subpoenas issued by

Brimson makes clear that the mere issuance of a subpoena is not an exercise of judicial power. This reflects the commonsense notion that, when attorneys in a civil case issue subpoenas, as the Federal Rules permit them to do, or executive officials issue subpoenas to investigate possible violations of federal law, they are not exercising Article III authority.

Verizon's makeshift Article III argument would require the invalidation of a host of other statutes in which Congress has authorized subpoenas outside the context of pending or anticipated litigation. Such subpoenas are authorized by various patent laws, 35 U.S.C. § 24 (authorizing, since 1870, issuance of subpoenas for evidence in patent interference proceedings); 7 U.S.C. § 2354(a) (enacted in 1970 and providing for same procedure); the Railway Labor Act, 45 U.S.C. § 157(h) (authorizing, as of 1926, clerks to issue subpoenas at request of private party arbitrators); and the law establishing Judicial Councils for investigating allegations of judicial misconduct, 28 U.S.C. § 332(d)(1) (authorizing, as of 1990, issuance of subpoenas by clerk and enforcement by contempt). Congress has also authorized the issuance of judicially-backed subpoenas by administrative agencies such as OSHA, 29 U.S.C. § 657(b), and the NLRB, 29 U.S.C. § 161(1), and even by private parties, *e.g.*, 9 U.S.C. § 7 (authorizing private arbitrators to issue judicially enforceable subpoenas).[3]

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an entity other than an Article III judge: If there is any doubt whether a case or controversy exists at the time of issuance—and although none is necessary, such a case or controversy undoubtedly exists, *supra* Part I.A; *infra* Part I.C.—no such doubt can remain once there is a dispute over enforcement. By that time, the disputes "are so presented that the judicial power is capable of acting on them finally as between the parties before the court." *Brimson*, 154 U.S. at 478.

[3] Verizon attempts to distinguish a few of these statutes on the grounds that the statutes authorize subpoenas in the context either of a dispute

None of these statutes involve litigation pending before an Article III court at the time the subpoena is issued. All are at risk under Verizon's argument. Clearly, the issuance of judicially enforceable subpoenas outside a case or controversy is a long-accepted practice that is consistent with Article III.

Indeed, this Court recently concluded in *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004), that 28 U.S.C. § 1782 permits federal courts to issue subpoenas authorizing discovery at the behest of private parties in foreign tribunals, even when no action is yet pending in the foreign tribunal. In many instances in which § 1782 is invoked, there will be no controversy that can ever be cognizable in federal court. Yet the Court had no difficulty concluding that Congress authorized discovery in aid of the resolution of such proceedings. It is inconceivable that this Court could have rendered such a ruling if Verizon's theory of Article III had any merit.

2. The Article III decisions Verizon cites show only that the power to issue a judicially enforceable subpoena depends on a valid grant of authority from Congress. *E.g.*, *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (refusing to permit enforcement of subpoena, because the court lacked jurisdiction over the underlying suit, and there was no other source of authority); *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170-71 (1989) (permitting district court to facilitate notice to potential plaintiffs because statute demonstrated Congress's goal of collective lawsuits). Indeed, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950),

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pending before a federal agency, 35 U.S.C. § 24; 7 U.S.C. § 2354(a), or of a private arbitration that may result in an *award* enforceable in federal court, 45 U.S.C. § 157(h). But in neither situation is there an actual case or controversy pending (or anticipated) before an Article III tribunal in the sense Verizon argues is required.

makes this point explicitly. The Court there faced the question whether the Federal Trade Commission could issue certain subpoenas without interfering with the courts' prerogative. Having determined that such an agency action did not interfere with any *inherent* power of the courts, *id.* at 641-42, the Court turned to the question of where *Congress* had placed the subpoena power: The Federal Trade Commission Act shows that "Congress obviously deemed it a function of the Commission, rather than of the courts." *Id.* at 643. *Morton Salt* turned not on whether Article III permits courts to issue subpoenas absent a case or controversy, but on where Congress had placed that power, *id.* *Morton Salt* gives no support to the suggestion that Article III *bars* Congress from placing that authority in the courts or a court clerk; to the contrary, its discussion suggests that Congress may do so if it wishes.

Here, of course, Congress has specifically authorized the issuance of subpoenas prior to the filing of a complaint in federal court. Section 512(h) thus is a permissible exercise of Congress's authority under Article I, and does not in any way invade the province of the Judiciary.

3. With Congress's power to authorize judicially-enforceable subpoenas outside a pending case or controversy well-established, the only remaining question is whether the ministerial task of issuing such subpoenas may be assigned to a federal court clerk.[4] This Court has consistently held, however, that Article III actors (even judges) may be delegated a host of non-judicial functions, so long as the delegation neither aggrandizes the authority of

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[4] Verizon is wrong to suggest that RIAA waived the argument that issuance of a subpoena is a ministerial task. Cross-Pet. at 18. To the contrary, RIAA explicitly argued, "[A]s the district court recognized and Congress made clear, issuance of a DMCA subpoena is a 'ministerial' task that requires no exercise of discretion." Brief of Appellee RIAA, No. 03-7015, at 25 (D.C. Cir. filed July 10, 2003).

the judiciary nor interferes with its operation. *See Morrison v. Olson*, 487 U.S. 654, 681 n.20 (1988). Congress can delegate tasks such as overseeing the independent counsel process, *see id.*, serving on the sentencing commission, *see Mistretta v. United States*, 488 U.S. 361 (1989), or conducting extradition proceedings, *see Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996). Indeed, the statute at issue in *Brimson* authorized judges or clerks to preside over depositions conducted pursuant to the ICC's subpoena authority. *See Brimson*, 154 U.S. at 462.

Moreover, the Court has held repeatedly that the performance of ministerial functions by clerks of the Court does not constitute the exercise of Judicial Power. *E.g.*, *Custiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 233 (1810); *Elliott v. Peirsol's Lessee*, 26 U.S. (1 Pet.) 328 (1828); *Ex parte Virginia*, 100 U.S. 339 (1879); *Central Loan & Trust Co. v. Campbell Comm'n Co.*, 173 U.S. 84 (1899). Thus, clerks have long performed a wide variety of ministerial tasks Congress delegated to them, including such things as recordation of inquisitions, deeds, and other legal documents, *see Custiss*, issuance of summons and arrest warrants, *see United States v. Turner*, 933 F.2d 240 (4th Cir. 1991), computation of interest, *see Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058 (11th Cir. 1996), and other non-discretionary functions. *See generally Ex parte Virginia*, 100 U.S. 339 (1879) (discussing distinction between judicial acts and ministerial functions). All of these acts have legal consequences, but none are an exercise of the Judicial Power.[5]

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[5] Verizon relies on *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792) and *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), but those cases affirm Congress's power to delegate non-judicial functions to judges. *See, e.g.*, *Ferreira*, 54 U.S. (13 How.) at 50. Those cases stand merely for the proposition that federal judges cannot render initial decisions on matters that are subsequently reviewed and decided by executive branch officials.

The issuance of a subpoena under § 512(h) is a ministerial function. This Court has specifically stated that "agents issuing . . . subpoenas perform ministerial acts only." *Lewis v. NLRB*, 357 U.S. 10, 15 (1958). Moreover, Congress stated expressly that it intended the issuance of DMCA subpoenas to be "a ministerial function." S. Rep. No. 105-190, at 51 (1998). Indeed, the steps required of the clerk under § 512(h) are far more ministerial in nature than other acts this Court has characterized as ministerial. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990) (calling city's duty of "review[ing] the general qualifications of each license applicant" a ministerial function); *Morrison*, 487 U.S. at 681 & n.19 (calling determination of whether "good cause" is shown for an extension of time a ministerial function). As the district court recognized, the clerk's task under § 512(h) of determining whether a subpoena request contains three required documents is clearly within this category. Pet. App. 61a.[6]

See Mistretta, 488 U.S. at 402-04 (discussing *Hayburn's Case* and *Ferreira*); *Brimson*, 154 U.S. at 480-85 (noting that the Court's holding was "not inconsistent with anything said or decided in those [*Hayburn's Case* and *Ferreira*] cases"). The Article III problem in those cases involved the issuance by federal judges of decisions that were in effect advisory opinions because they were subject to review and correction by non-Article III government officials. In *Ferriera*, the Court upheld the authority of Congress to delegate a non-judicial task to an Article III judge. The Court merely held that the federal courts lacked subject matter jurisdiction to review the decision of a federal judge acting pursuant to such authority because the decision was not a judicial act.

[5] The fact the clerk is appointed by an Article III judge does not change the analysis. Inferior officers appointed by Article III judges, such as clerks or election supervisors, may perform tasks that are non-judicial in nature and may even be unambiguously Executive in character. *See Ex parte Siebold*, 100 U.S. 371 (1879) (rejecting argument that inferior officers appointed by judges can only perform judicial functions); *Morrison*, 487 U.S. at 676 & n.13 (finding no "inherent incongruity [in] a court having the power to appoint prosecutorial officers").

Verizon wildly overshoots by claiming that § 512(h) commandeers clerks to engage in inquisitorial functions. Section 512(h) does not authorize the judiciary to spearhead investigations on its own initiative. It does not involve the clerk in proposing targets of investigation or evaluating the merits of particular claims. It gives the clerk no more investigative power than does Rule 45 or any of the other provisions authorizing clerks to issue subpoenas. Thus, the imposition of this duty on the clerk poses no "threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power . . . with the judicial power." *Mistretta*, 488 U.S. at 380-81, 393.

C. The Right to Information Established in § 512(h) Itself Supplies a Case or Controversy.

Wholly apart from the foregoing, § 512(h) is constitutional because a "case or controversy" exists where—as here—a federal statute gives a private party a right and that party seeks to enforce it in federal court. Section 512(h) does exactly that: It gives copyright owners a federal right to information from ISPs and makes that right enforceable in federal court.

Section 512(h) is thus no different from other federal statutes that create rights to obtain information (regardless of whether a separate lawsuit is pending) and that indisputably present a case or controversy when a party seeks to enforce its statutory right. For example, an ERISA beneficiary's demand for information from a plan administrator is no less backed by federal court enforcement than here. *See* 29 U.S.C. § 1132(c)(1); *see also* 5 U.S.C. § 552(a) (Freedom of Information Act).

Verizon appears to believe that there can be no case or controversy absent the filing of a complaint, but nothing in

Article III imposes that condition. The Constitution does not require "cases" or "controversies" to come in a particular form. *See Nashville, C. & St. L. Ry.*, 288 U.S. at 259 (Whether a dispute is within the bounds of the Judicial Power is a question "not with form, but with substance"); *id.* (Courts "look not to the label which the Legislature has attached to the procedure . . . or to the description of the judgment which is brought here for review, . . . but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."). Rather, Congress has full power to define procedures that, in its view, are necessary and proper to the attainment of its legislative goals:

> [T]he Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited the judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. . . . Hence changes merely in the form or method of procedure by which federal rights are brought to final adjudication . . . are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.

Id. at 264; *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Marshall, C.J.) ("[W]hen the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . .").

Pursuant to its enumerated powers, Congress has authority to create streamlined procedures, so long as they meet certain basic criteria under Article III. *Nashville, C. & St. L. Ry.*, 288 U.S. at 262-63 (fact of "modified procedure" does not determine whether case or controversy exists); *Aetna Life*, 300 U.S. at 240 (In "exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict."); *Fidelity Nat'l Bank & Trust Co. v. Swope*, 274 U.S. 123, 131-32 (1927). Indeed, a case or controversy can be present even where no pleadings are filed whatsoever. *See Tutun v. United States*, 270 U.S. 568, 577 (1926); *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893) ("No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."); *see also In re Summers*, 325 U.S. 561, 568-69 (1945) (finding case or controversy even though state supreme court held that it did not exercise its judicial power: "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy.").

It makes no difference for purposes of Article III whether a copyright owner files a notification and receives a subpoena issued by the clerk, or files a complaint and receives a summons, also issued by the clerk. *See Brimson*, 154 U.S. at 486 (rejecting formalistic interpretation of Article III that would permit Congress to create a cause of action for obtaining information but prohibit Congress from authorizing subpoenas backed by judicial enforcement to achieve the same result). In either case, the copyright owner has asserted its rights in the manner prescribed by Congress.

All of the traditional requirements of a case or controversy are present here. The dispute with the ISP over the information is ripe, not moot, and neither hypothetical

nor advisory. The parties are adverse and interested, and the remedy—enforcement of a subpoena—is well within the competence of the courts. As such, a "case or controversy" is present, and Verizon's Article III challenge fails.

CONCLUSION

If the Court grants RIAA's Petition for Writ of Certiorari, RIAA has no objection to the Court granting the conditional cross-petition.

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